BOOK REVIEWS.

A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW. By James Bradley Thayer, LL. D., Weld Professor of Law at Harvard University. Boston: Little, Brown & Co., 1898. Pp. xxxvi, 636. Crown 8vo. Cloth, $3.50 net.

In a notice of Part I of the above work (published separately in 1896) Sir Frederick Pollock (xiii *Law Quarterly Review*, 208), says: "We are at last in a way to possess an exposition of our law of evidence from the hand of a modern lawyer, who is also an accurate historical scholar." And in a review of the completed work (xv L. Q. R. 86), he declares that it "goes to the root of the subject more thoroughly, we venture to say, than any other text-book in existence."

This is high praise from one who speaks with authority; but it is no higher than the treatise of Professor Thayer deserves. It discusses a most difficult subject, and brings order out of a chaos which has been almost the despair of intelligent students of the law of evidence. In the language of Professor Thayer (p. 527): "The chief defects in this body of law, as it now stands, are that motley and undiscriminated character of its contents which has been already commented on; the ambiguity of its terminology; the multiplicity and rigor of its rules and exceptions to rules; the difficulty of grasping these and perceiving their true place and relation in the system, and of determining, in the decision of new questions, whether to give scope and extension to the rational principles that lie at the bottom of all modern theories of evidence, or to those checks and qualifications of these principles which have grown out of the machinery through which our system is applied, namely, the jury. These defects discourage and make difficult any thorough and scientific knowledge of this part of the law and its peculiarities. Strange to say, such a knowledge is very unusual, even among the judges."

We do not think it strange, however, that "a thorough and scientific knowledge" of the law of evidence should be "very unusual, even among the judges;" for, up to the present time, it has been impossible to obtain such knowledge from the treatises on the subject. And the necessity which Prof. Thayer has been under, as explained in his *Introduction*, to prepare the present work (on which he tells us he has not spared time or labor) as a *preliminary* to a treatise for practical use, demonstrates how well-nigh hopeless has been the effort to grasp the principles of evidence to those who could not devote years of historical research and persistent thought to this intricate and perplexed topic.

In a "Prefatory Note" Prof. Thayer thus states the scope and purpose of the present volume: "By tracing the development of trial by jury, the author has endeavored to throw light on the beginnings and true character of our rules of evidence; by a more accurate analysis and a fuller illustration than is common, of the distinction between law and fact, to make plainer the respective functions of the jury and the court; and by an investigation of certain important topics, ordinarily, but, as it is believed, improperly treated as belonging to the law of evidence, to discriminate them from that part of the law, and set them in their proper place."

The leading idea of Prof. Thayer's exposition of the law of evidence is that it is the "child of the jury system," and that "one who would state the law of evi-

dence truly must allow himself to grow intimately acquainted with the working of the jury system and its long history" (p. 267, note). And on page 2 he says: "English-speaking countries have what we call a 'Law of Evidence,' but no other country has it; we alone have generated and evolved this large, elaborate, and difficult doctrine. . . . It is the institution of the jury which accounts for the common law system of evidence—an institution which English-speaking people have had and used, in one or another department of their public affairs, ever since the Conquest. Other peoples have had it only in quite recent times, unless, indeed, they belong to those who began with it centuries ago, and then allowed it to become obsolete and forgotten. England alone kept it, and in a strange fashion has developed it."

Accordingly, after some account of the older modes of trial, the author devotes three chapters to "Trial by Jury and its Development," tracing the history of the English jury through the earlier judicial records and the Year Books, so far as these are in print, "thus connecting what is well known in our modern English law with the admirable researches of Dr. Brunner into the early continental history of the jury." This investigation of the history of the English jury—based on the author's own researches—is done in a masterly manner, and is of absorbing interest. When one sees what use Prof. Thayer has made of the Year Books, one is ready to believe with him (Report of Am. Bar Association, Vol. 18, p. 419) that "these great repositories of our mediæval law" contain "in their quaint and antiquated learning the key to many a modern anomaly," and to share in his lament over their condition (with a few exceptions) as "ill-printed, unedited, untranslated folios."

After the chapters on the origin and development of trial by jury, there follows a discussion, in a chapter of eighty pages, of "Law and Fact in Jury Trials," in which the functions of judge and jury are discriminated acutely and satisfactorily. This, it seems to us, is one of the most important chapters in the book; and it shows that the writer is as familiar with the rules of pleading and practice as he is with the law of evidence.

Having thus completed his investigation of the origin and scope of trial by jury, Prof. Thayer is ready to take up the question, What is the law of evidence, and, in answering it, to demonstrate the two fundamental propositions for which he contends, viz.: (1) that the rules of evidence, properly so called, are negative in their nature, deciding not what is admissible as evidence, but what is inadmissible; and (2) that much that is in the law of evidence is not truly of it, but belongs to the domain of legal reasoning, or is to be referred to other branches of the law.

What, then, is evidence? We shall let the author answer (p. 264): "The law of evidence has to do with the furnishing to a court of matter of fact, for use in a judicial investigation. But how 'has to do?' (1) It prescribes the manner of presenting evidence; as by requiring that it shall be given in open court, by one who personally knows the thing, appearing in person, subject to cross-examination, or by allowing it to be given by deposition, taken in such and such a way; and the like. (2) It fixes the qualifications and the privilege of witnesses, and the mode of examining them. (3) And chiefly, it determines, as among probative matters, matters in their nature evidential—what classes of things shall not be received. This excluding function is the characteristic one of our law of evidence."

This proposition, that rules of evidence are rules of exclusion, and are invoked

to decide what evidential matter shall *not* be received, is the basic principle which underlies the whole of the author's treatment of the subject. Thus, it is not the law of evidence which decides, when one offers to prove matters of fact as a basis of inference to another matter of fact, what facts are really probative, what matters are in their nature evidential. "The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience—assuming that the principles of reasoning are known to its judges and ministers, just as a vast number of other things are assumed as already sufficiently known to them" (p. 265). But when a fact is evidential, it is the law of evidence which, nevertheless, sometimes excludes it. "Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous in their effect on the jury, and likely to be misused or over-estimated by that body; others, as being impolitic or unsafe on public grounds; others, on the bare ground of precedent. It is this sort of thing, as I said before—the rejection on one or another practical ground of what is really probative—which is the characteristic thing in the law of evidence, stamping it as the child of the jury system" (p. 266).

But it must not be supposed that because rules of evidence are properly rules of exclusion that therefore *all* rules of exclusion are rules of evidence. This is clearly explained by the author, at page 515: "There are many reasons for excluding what is offered in evidence that have no relation at all to the law of evidence. If a thing be excluded because it is not within the scope of the general issue, it is excluded by the law of pleading; if, under the substantive law of the case, what is offered has nothing to do with the question, then it is the substantive law of the case that excludes; if what is offered has no logical relation to the case, then it is the rule of reason that rejects it; or a party may be estopped from setting up what he offers evidence to prove. But when a matter of fact bearing on the issue is excluded for none of these reasons, yet lawfully, it is the law of evidence that is working; as when the question is whether you may offer the sworn affidavit of a trustworthy eye-witness, not personally present in court, or a testator's extrinsic statement, when signing his will, that he meant one person rather than another of similar but not identical name; the exclusion in such cases is made by the rules of evidence; what is offered is relevant and material, but still is inadmissible."

To enforce and illustrate the position assumed, that many of the topics ordinarily discussed in works on evidence do not belong there, but "ought to be carried to the border line of this subject, and respectfully deposited on the other side," the author devotes a large portion of his book to a critical examination of the following topics, viz.: Judicial Notice, Presumptions, the Burden of Proof, the "Parol Evidence" Rule, and the "Best Evidence" Rule, with the result that he excludes them from the law of evidence, and relegates them either to the region of legal reasoning, or to the substantive law, or to the law of pleading and procedure. With reference to the first three topics named above, he says (p. 389): "To undertake to crowd within the comparatively narrow limits proper to the law of evidence the considerations governing the determination of matters of a far wider scope, like those questions of logic, and general experience and substantive law involved in the subjects of Presumptions and Judicial Notice, and those other questions compounded of like considerations, coupled with others relating to the history and technicalities of pleading and forensic procedure, which

lie at the bottom of what is called by this name of the 'Burden of Proof,'—to attempt this is to burst the sides of the smaller subject and to bring obscurity over both."

As to the "Parol Evidence" rule, the author concludes that almost all that is usually treated thereunder, is properly referable to the substantive law, or to the law of interpretation and construction; but he discovers *one rule of evidence*, viz., that relating to extrinsic declarations by a testator of his intention; but this rule of evidence is not that which *admits* such declarations, in the one case of "equivocation," but that which *excludes* such declarations, though in their nature evidential, in all other cases. As to the so-called "Best Evidence" rule, the conclusion reached is, that it is misleading, and "should be discarded in any sense of a working rule of exclusion; all that it truly imports may be expressed by the simple and useful terms 'primary' and 'secondary' evidence."

We have now reached the author's concluding chapter, "The Present and Future of the Law of Evidence." It contains an excellent summary of the law of evidence as it now exists, and points out its chief defects in a paragraph which has been already quoted. As to the future of the law of evidence, the author declares (p. 530) that the "rules of evidence should be simplified; and should take on the general character of principles to guide the sound judgment of the judge, rather than minute rules to bind it. The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it. And then, as regards the mass of detailed rules, these should mainly be subject at all times to the shaping and controlling power of the highest courts, in the different jurisdictions, in making rules of court."

To accomplish this, the author thinks that some legislation would probably be necessary; but he says that the rules of evidence on which we practise to-day have mostly grown up at the hands of the judges, and they can largely reshape and recast them, if they will (p. 531). That the judges should recognize, resolutely and persistently, the subordinate, auxiliary, secondary, wholly incidental character and aim of the rules of evidence (properly so called); and in the whole of the secondary and adjective part of the law, there should be little opportunity to go back on the rulings of the trial judge; there should be an abuse in order to justify a review of them by an appellate court (p. 530).

Such is a brief and imperfect outline of Prof. Thayer's "Preliminary Treatise," the most important contribution to the *rationale* of the law of evidence that has ever been made, and for which he deserves the gratitude of all who seek to understand the principles of the subject. And we trust that nothing will prevent the realization of the "good hope" he expresses of supplementing the present volume before long by another, "in similar form, but of a more immediately practical character, giving a concise statement of the existing law of evidence."

C. A. GRAVES.

BOOKS RECEIVED.

(To be hereafter noticed.)

THE LAW OF MONOPOLIES AND INDUSTRIAL TRUSTS. By Charles Fisk Beach, Sr. St. Louis: The Central Law Journal Company. 1898.